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REPORT OF THE EXPERT MEETING ON THE IMPACT OF ANTI-DUMPING AND COUNTERVAILING ACTIONS

Held at the Palais des Nations, Geneva,
from 4 to 6 December 2000

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I. OUTCOME [1]

1. The Expert Meeting on the Impact of Anti-Dumping and Countervailing Actions was held in Geneva from 4 to 6 December 2000. The decision to organize this Meeting was taken in accordance with paragraph 132 of the UNCTAD X Plan of Action (TD/386), which states that "UNCTAD's work should relate first to analysis and, where appropriate, on the basis of the analysis, contribute to consensus-building on: impact of anti-dumping and countervailing duties actions". The following is the outcome of the Expert Meeting. Pursuant to the Trade and Development Board's decision taken at its twenty-fourth executive session, the outcome will be circulated by the secretariat to member States with a request for policy comments on the experts' recommendations. The responses of member States will be taken into account in the preparation of the secretariat documentation for the fifth session of the Commission on Trade in Goods and Services, and Commodities, to be held from 19 to 23 February 2001.

2. Individual experts, on the basis of the concrete experiences presented at the Meeting, put forward their views on the possible ways and means of addressing the issues and areas of concern to developing countries so that the adverse effects of anti-dumping and countervailing duty actions on trade, particularly that of developing countries, could be reduced. The following text summarizes their suggestions. Not all of the views were shared by all experts; the text is intended to reflect fairly the richness and diversity of the views expressed, rather than agreement.

3. Several experts and the background note prepared by the secretariat emphasized that anti-dumping and countervailing duty actions are legitimate measures permitted under GATT/WTO rules, and considered that the proposed changes should be seen in the context of their impact on investigatory practices and the ability to ensure fair trade.

Main issues identified

4. On the basis of national experiences, presentations of resource persons and the background note prepared by the UNCTAD secretariat (TD/B/COM.1/EM.14/2), the experts identified issues relating to anti-dumping and countervailing measures which might be addressed, as appropriate, in (a) future multilateral trade negotiations; (b) the current activities of the WTO Committee on Anti-Dumping Practices and its organs; (c) the WTO dispute settlement mechanism; (d) national policies of member States; and (e) the future work of UNCTAD and other relevant international organizations in this area, including technical assistance activities. The following views were expressed in the debate.

[1] As adopted by the Expert Meeting at its closing plenary meeting on 6 December 2000.

A. Dumping

Five per cent viability test

5. The 5 per cent viability test should be applied on a global basis for the like product. The investigating authorities should conduct a further review to determine whether the low domestic sales volume compared with the export volume was caused by the small size of the domestic market of the exporting country and might therefore serve as the basis for normal value. The per capita consumption of the product concerned should be taken into account.

Exclusion of sales below cost

6. The current 20 per cent threshold may not adequately reflect business realities. The practice of investigating authorities seems to suggest that where sales below cost represent more than 20 per cent of total domestic sales, such sales are systematically excluded and normal value is based on remaining sales above cost artificially and arbitrarily increasing normal values and dumping margins. To tackle this problem, the current 20 per cent cut-off could be increased, and authorities must respect the "reasonable period of time" as required by the Agreement on Anti-Dumping (AAD).

7. The weighted average normal value may not be less than the weighted average cost per unit.

Constructed normal value

8. Experience seems to suggest that manipulation of exporters' financial information may result in an increase in their dumping margins under certain circumstances. Article 2.2.2 of the AAD allows too much discretion and may lead to unreasonable selling, general and administrative expenses and profit calculations in certain cases. Therefore, the current provision should be clarified.

Fair and symmetrical comparison

9. In order to achieve a fair comparison, common rules must be established to obtain equal results based on the same set of data.

Credit cost

10. Actual credit costs should be accepted in normal value calculations even if they are not based on contractual arrangements.

Duty drawback

11. High standards of burden of proof are currently used in some jurisdictions to reject or minimize normal value adjustments based on valid duty drawback claims. Article 2.4 of the AAD should be clarified to ensure that drawback adjustments are based on prevailing business practices and realities.

Level of trade

12. Some countries define the difference in level of trade in a complicated manner, thereby imposing an unreasonable burden of proof on exporters. Also, countries do not provide proper information regarding the definition of level of trade. Rules on identification and quantification of level of trade adjustments are needed.

Exchange rate fluctuations

13. The absence of a definition of "sustained movement" in Article 2.4.1 is a matter of concern for countries with floating exchange rates. Short-term fluctuations and long-term trends in exchange rates should be clearly distinguished and the long-term trends should be defined as "sustained movement", which would normally imply a period exceeding 60 days for adjustment of export prices.

Exchange gains or offsets

14. While exchange losses are usually taken into account, exchange gains are frequently ignored on narrow, technical grounds, thereby inflating costs and minimizing favourable adjustments. Article 2.2.1.1 should be clarified so as to exclude consideration of both exchange gains and losses, or to ensure that exchange gains are included in the calculation of costs of production.

Zeroing (exceptions)

15. The three exceptions contained in Article 2.4.2 (purchasers, regions and time periods) are too broad and disproportionately benefit large economies. The exceptions must be tightened. Zeroing should not be applied in investigations or reviews.

Non-market-economy treatment

16. Non-market-economy provisions should be applied only against countries which meet the criteria in GATT Article VI, i.e. those which have a "complete or substantially complete monopoly of [their] trade and when all domestic prices are fixed by the State". Very few countries at present meet these criteria.

17. In cases where investigating authorities encounter difficulties in establishing normal value, for example for exports from countries in transition, they should ensure that the methodologies used are fair and predictable.

De minimis dumping

18. The practical impact of an increased *de minimis* dumping margin should be empirically researched. UNCTAD could undertake a study on this issue.

Cyclical industries

19. Given the fact that some industries are cyclical, the current treatment of sales below costs of production as set out in the AAD can result in a finding of dumping during periods of low capacity utilization. Solutions should be sought to avoid massive imposition of measures during such periods.

B. Injury

Basis of negligibility

20. Thresholds for excluding negligible imports from injury determinations should be based on market share rather than on share of total imports.

Negligible import volumes

21. The level of negligible imports should be increased to a level higher than the current 3 per cent on the basis of empirical research demonstrating a positive trade impact.

Cumulation

22. The cumulation of suppliers that individually meet the negligibility criteria, using the 7 per cent rule, should be revised or eliminated.

Captive production/definition of "industry"

23. The exclusion of captive production from injury analysis should not occur without proper justification.

Lesser duty rules

24. The lesser duty rule should be made mandatory and its application made subject to regular review. Some authorities have encountered difficulties in calculating the lesser duty.

C. Procedure

Back-to-back complaints

25. The repeated recourse to anti-dumping actions against the same product has been identified as one of the problems relating to the implementation of the AAD. The disciplines in this regard should be strengthened to preclude the initiation of any investigation for a period of 365 days from the date of termination of a previous investigation of the same product from the same country.

26. Petitions brought before the investigating authorities within 365 days should be examined with the utmost care.

Standing

27. When challenging standing, the burden of proof should not be on the exporters; rather, the national investigating authorities of the importing country should demonstrate that they have correctly determined standing in accordance with Article 5.4 of the AAD.

Sunset reviews

28. Anti-dumping and countervailing duty actions should not normally continue after five years. An anti-dumping duty should remain in force only as long as and to the extent necessary to counteract dumping which is causing injury. The investigating authorities have been conducting sunset reviews in conformity with the spirit and legal requirements of the WTO Agreements.

Questionnaires

29. Replying to questionnaires, some of which extend to hundreds of pages, constitutes a major burden, particularly for small and medium-sized exporters from developing countries. Questionnaires should be as simple as possible, focusing only on the necessary information. Consideration should be given to the preparation of a standard questionnaire.

Language

30. The difficulties in, and the cost of, translating documents required as evidence in investigations should be taken into account by investigating authorities with a view to minimizing the burden on respondents. Translation difficulties should be given special consideration as a justification for extending the normal 30-day period for responding to questionnaires.

Independent bodies

31. National anti-dumping/countervailing duty administering or investigating authorities should function autonomously with respect to technical decisions.

Price undertaking

32. To enable exporters to continue to have access to the market, price undertakings should be accepted, if offered by exporters on terms that would remedy dumping or its injurious effects, as an alternative to anti-dumping duties.

D. Special concerns of developing countries

33. Anti-dumping actions, including the initiation of investigations that are subsequently determined to be unfounded, may often have a devastating effect on the economies and societies of developing countries since they cut off trade in crucial export markets. They often frustrate those countries' efforts to diversify their exports into new sectors of production. Anti-dumping actions may result in a diversion of investment away from developing countries to the major market countries. Anti-circumvention measures could result in countries which have made no contribution to material injury in the importing country being caught up in anti-dumping actions. Developing countries are particularly concerned that, upon the expiry of the Agreement on Textiles and Clothing, there could be a wave of anti-dumping actions against textile and clothing exports.

34. There is a need to make the best-endeavour provisions of Article 15 of the AAD operational. This could be accomplished by, *inter alia*, increasing the *de minimis* thresholds for dumping and injury to levels which would provide meaningful trade advantages for developing countries and eliminating cumulation of their exports. Increases of these thresholds to 5 per cent were suggested, but further empirical analysis should be undertaken to ensure that these levels are high enough to accord meaningful trade advantages to developing countries. Higher thresholds would also reduce the cost of defence against anti-dumping actions by developing countries as they would be automatically excluded in a greater number of cases. The possibility of recommending progressive duties in the case of developing countries should be explored in order to help the producers in those countries in realigning their production.

Cost of defence

35. Developing country exporters face serious difficulties in defending their interests against anti-dumping actions. They usually do not possess the necessary technical expertise, and lack the resources required for legal counsel in anti-dumping actions or in pursuing their rights under the WTO dispute settlement mechanism. These exporters require training in order to understand dumping issues so as to minimize the risk of anti-dumping actions against them.

Difficulties in application

36. Developing countries, which are the subject of dumping, face difficulties in applying anti-dumping actions. They lack the financial, technical and human resources to conduct investigations. As a result, many find themselves unable to defend their producers against dumped imports. They require technical and financial assistance to strengthen their administrations.

37. Dumped imports are a particular problem for African countries. They perceive that they are victims of increased dumping from outside the region; and they require assistance in addressing this problem. A solution should be sought for African countries.

Small economies

38. Technical assistance should take into consideration the specificities of small developing economies, such as a notable lack of financial, technical and human resources, and should provide for a practical approach to institution-building that could economize on investigation, administrative and other costs.

39. Given the size of the market and the strength of the local industries, the time taken by a local industry to lodge a complaint and for an anti-dumping investigation to be initiated may result in the death of the industry.

40. Small economies have few products for export and any anti-dumping actions against these products will destabilize the economy.

Countervailing duties

41. In assessing duty drawback systems in developing countries, aggregate evidence should be accepted when exporters are unable to identify individual inputs. Developing countries request that they be entitled to estimate the incidence of excise, sales and other internal taxes for refund without this being considered an export subsidy. The *de minimis* subsidy level for countervailing duty investigations should be increased from 2 per cent to 3.5 per cent for developing country exports.

II. SUMMARY OF DISCUSSIONS [2]

A. Presentations by experts on country experiences

42. Individual experts made presentations, in their own capacity, on experiences with the impact of anti-dumping and countervailing duty actions on the following countries: Philippines, China, Turkey, Cuba, Burundi, Venezuela, Pakistan, Malaysia, India, Russian Federation, Peru, Uruguay, Vietnam, Zimbabwe, Angola, Chile, Tanzania, Kenya, Mauritius and Republic of Korea.

Experience of the Philippines

43. In stressing the importance of fair trade and fair competition rather than increased trade, Philippines anti-dumping and countervailing duty (AD/CVD) laws aim at providing trade remedies to domestic industries. So far, many local industries have availed themselves of AD remedies to counteract unfair trade practices and CVD has not yet been used. To implement AD remedies, in-depth investigation (i.e. actual consultations, use of questionnaires, plant visits, overseas investigation, desk research, formal hearings) has been conducted. The sectors of imports that have been affected by Philippines AD actions are glassware, steel products, chemicals, cement, newsprint, etc. Parties affected have been Malaysia, Taiwan Province of China, Russian Federation, Republic of Korea, China, Thailand, etc. Government agencies responsible for conducting AD investigations have faced difficulties in getting the domestic wholesale price in the country of origin of the allegedly dumped product. The non-cooperation of some exporters as respondents to AD investigations has also had adverse effects.

44. The desire for developing countries to have easier and better access to developed country markets was emphasized.

Experience of China

45. As in the case of the Philippines, the expert from China emphasized the importance of fair competition. While the legitimate right of countries to use AD remedies to combat unfair trade is recognized, excessive reliance on or abuse of AD actions should be avoided with a view to reducing the negative trade impact of AD measures, of which China considers itself to be one of the worst victims; Chinese exports face a large number of AD measures, most of which have been imposed by China's major trading partners, i.e. the European Union and the United States. These actions, which involve exports worth tens of billions of US dollars, have become the major impediment to China's export trade and have worsened its trade pattern. Most of those measures are considered by China to be discriminatory, as the normal values of these AD cases were determined on the basis of the so-called "non-market economy" criteria of using "surrogate country" values. The achievements of China's market economy reforms have been disregarded.

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[2] Prepared by the UNCTAD secretariat.

In order to minimize the impact of AD actions on world trade, discriminatory practices should be abandoned. Transparency should be increased in the conduct of AD investigations. The "lesser duty rule" should be applied as mandatory. The "sunset clause" should be strictly enforced. China started to use AD actions in 1997. So far one case has been completed and four cases are under investigation. The main products involved in these cases are newsprint, steel products and polyester film.

Experience of Turkey

46. The expert from Turkey highlighted several problems arising in the context of AD investigations such as differences in accounting systems; difficulties in filling in questionnaires issued by the investigating authority; the cost of defending interests (fees for legal consultants etc.); and insufficient technical expertise on the part of the governmental authority. Regarding language problems, i.e. the necessity for exporters to provide translations of all necessary documentation, additional time should be provided in that connection. In addition, determination of AD margins should be undertaken in a realistic manner by applying a multiple approach on the basis of realistic business conditions and cost estimations. Such a realistic application of AD/CVD would be conducive to predictability in the multilateral trading system and to stable market conditions.

Experience of Cuba

47. Cuba's experience relates to antidumping measures applied by Canada to exports of steel from the Republic of Korea, Turkey and Cuba. In this context, significant problems arose with regard to Article 3.3 of the Anti-dumping Agreement (ADA) under which a cumulative evaluation of the effects of dumped imports from more than one country may be undertaken. Firstly, Article 3.3 states that authorities should determine that the margin of dumping from each country is not *de minimis*. In the case of Cuba, the margin of dumping was determined under non-market economy treatment, which, according to Cuba, should not have been applied. Secondly, Article 3.3 states that authorities should determine that the volume of imports from each country is not negligible. In the case of Cuba, exports have nearly always been under 3 per cent of Canada's imports, but in the period chosen by the Canadian authorities, Cuban exports were at a level of 3.4 per cent. Thirdly, under Article 3.3, authorities should determine that a cumulative assessment is appropriate in light of the conditions of competition between the imports and the domestic like product. This was not taken into account in the case of Cuba. Finally, there is a need to reformulate Article 15 on special and differential treatment in order to make its provisions operational and binding.

Experience of Burundi

48. Burundi is facing difficulties in the application of AD measures by itself and by its trading partners. Burundi lacks institutional capacity and expertise to carry out AD investigations. Subsidies applied by its neighbouring countries have hindered its exports, but Burundi's limited

capacity has not allowed it to defend its interests effectively. Increased provision of technical assistance, as well as the simplification of rules and procedures, would be necessary for Burundi to benefit effectively from AD/CVD provisions of the WTO.

Experience of Venezuela

49. The 1992 Venezuelan law on unfair practices in international trade was adopted with the aim of preventing dumped imports or imports of subsidized products from having a negative effect on domestic industry. The national body dealing with matters relating to the operation of the antidumping agreements is the Anti-dumping and Subsidies Commission (CASS). CASS is an autonomous body with the authority to initiate and conduct investigations, as well as implement anti-dumping measures. While CASS helps to promote trade by ensuring fair competition, Venezuelan legislation encourages the competitiveness of domestic industry by providing for the application of a "lesser duty" rule. Since its creation, CASS has initiated and completed 18 investigations. Venezuela's exports have faced a similar number of cases abroad. The major problems and challenges faced by Venezuela could be summarized as follows: (a) it was difficult for Venezuelan companies to embrace the mechanism provided for in the AD agreement; meeting the high costs involved and supplying the required information were major problems; (b) a major challenge for future multilateral trade negotiations could be the revision of the antidumping and subsidies provisions to clarify grey areas and to reduce the margin of discretion in the administration and application of laws. Work towards achieving more transparency in the imposition and maintenance of AD duties is essential in this regard.

Experience of Pakistan

50. Pakistan has limited experience in the area of AD/CVD. Its exports, mainly textiles, have often been subject to AD measures in the major markets (i.e. cotton yarn in Japan and grey fabrics and bed linen in the EU). The issue of sales below cost has been most apparent in the cotton-based industry, where cotton is a local input and whose prices depend upon erratic supply. In the case of both grey fabrics and bed linen, the AD proceedings were initiated by the EU in addition to quota restraints. Pakistan's experience has been that its export firms have not been able to defend the cases properly. This has been due mainly to the lack of comparable international accounting systems and difficulties faced by export firms in filling out the questionnaires, and many firms selected for investigation could not respond and did not have the technical and financial means to defend themselves. As a result, dumping margins have been assessed at higher rates. Furthermore, the repeated initiation of investigations on the same products have had severe trade-chilling effects on Pakistan's exports. Pakistan also fears that the removal of textile quotas in four years' time could lead to a new wave of AD actions. The expert suggested that, for resource and agriculture-based products (such as cotton-based products), a longer average cost cycle needs to be provided to bring the costs closer to reality.

Experience of Malaysia

51. Malaysia's legislation governing AD/CVD actions are the Countervailing and Anti-Dumping Duties Act of 1993 and the Countervailing and Anti-Dumping Duties Regulations of 1994 as amended upon the entry into force of the Uruguay Round Agreement. Since 1995, five AD actions have been initiated and definitive duties imposed on four mostly paper products - self-copy paper (SCP) or non-carbon-required paper (NCR), corrugated medium paper (CMP) and plaster/gypsum boards. Exporters from nine countries or groupings were affected by Malaysian AD actions, and six were subject to the imposition of definitive duties, including Australia, EU, Japan, Poland and two countries from the ASEAN region. The range of AD duties imposed was from 0 to 114 per cent. The trade impact analysis showed that, depending on the products and the AD duties imposed, the impact of Malaysian AD actions varied but generally had a negative impact on trade. As to Malaysian exports subject to AD/CVD measures, 16 products such as steel, electrical and chemical equipment, polymers, rubber, wood, textiles and bicycles were subject to AD/CVD actions by the EU, South Africa, the United States, Australia, Singapore, the Republic of Korea and India. Those actions have had negative impacts on Malaysian exports in almost all cases.

Experience of India

52. The Indian expert said that Indian exports such as fabrics often encounter discriminatory AD measures in major developed markets in the form of "back-to-back complaints" which severely harass its exports. Little consideration has been given to provision of special and differential treatment by those countries applying AD measures.

53. India is also a user of AD measures but has applied them rigorously and in a conservative manner. Although India enacted its AD legislation in 1982, the first case was not brought until 1992. The institution of the AD system in the country was not the result of intended policy, but of market reality. In imposing AD duty, India has applied the lesser duty rule in its 59 AD cases, and only in two cases did the final determination fail to confirm the existence of AD and material injury (in contrast to the developed countries' record of 50 per cent of cases not resulting in an AD finding). Lower domestic prices have been applied in the calculation of dumping margins, and even if dumping is found, AD duty has been imposed in a strictly time-bound manner.

54. In the light of Indian practice, developed country practices such as back-to-back application of AD measures clearly go against the disciplines established under the ADA and severely hinder access to their markets. The application of AD measures has also been facilitated by the weakness in the multilateral judicial disciplines ("standard of review" of Article 17.6 of the ADA). AD duties applied to Indian exports are particularly harmful in such sectors as textiles, chemicals and steel, and AD actions have even hampered exports involving small quantities of goods. The situation of double-jeopardy exists for textiles. Suggestions were made to increase the *de minimis* dumping margin and market/import share, to provide notice in advance when AD

action is to be imposed on developing country exports and to apply it gradually on a step-by-step basis so as to allow a "breathing period".

Experience of the Russian Federation

55. The expert from the Russian Federation said that the Russian Federation is greatly concerned with the various restrictions applied by its trading partners against Russian exporters. In the period 1992-2000, the number of such restrictions increased from 13 to 113. According to Russian estimates, Russian exporters lose up to 1.5-2 billion US dollars annually due to these restrictions. In this regard, Russia continues to be one of the countries facing the greatest discrimination in international trade. Anti-dumping measures are the most prominent type of restriction applied against Russian exporters. There are 65 registered anti-dumping measures involving Russian export products. The largest victim has been Russian steel exports (85 per cent of all anti-dumping measures). Other affected exports include chemicals, paper, uranium and glass. Thirty countries are applying anti-dumping measures against Russian exporters, and the bulk of such measures are registered in the European Union, the United States, India, Canada, the Republic of Korea, Peru, Poland, Ukraine and the Philippines. In this context, it should be noted that the increase of anti-dumping measures against Russian exporters can be partly explained by the fact that Russia is not yet a member of the WTO; and Russian economic reforms, including liberalization of the foreign trade regime and the opening up of the Russian domestic market, are not properly recognized by Russia's trading partners, including some developing countries, which still view Russia as a non-market economy in the absence of any clear economic criteria on this matter. The criteria mentioned in the ADA and GATT 1994, i.e. monopoly of foreign trade and setting of all prices by the State, are outdated and do not reflect realities. Accession to the WTO *per se* and support of this process by WTO members should mean in itself that an acceding country is a market economy.

56. For its part, Russia had not yet applied anti-dumping or countervailing measures, although relevant national legislation was adopted in 1998.

Experience of Peru

57. National legislation regarding dumping, anti-dumping and countervailing measures is set out in two Decrees. In addition, with the creation of the Andean Community, two decisions were adopted in 1999 with the aim of regulating dumping and subsidies in the five Andean Community countries. The body in charge of protecting domestic industry from the effects of dumping and unfair competition is the Inspectorate for Dumping and Subsidies (*Comision de Fiscalizacion de Dumping y Subsidios*). The majority of investigations on dumping and subsidies initiated by Peru involve Latin American countries, the reason being that these are Peru's major trading partners. The predominant sectors investigated are food processing and beverages, metals and electrical appliances, which are the main productive sectors of Peruvian industry. The major problems in the implementation of AD measures relate to the lack of financial resources to hire lawyers, the lack of time to carry out investigations, and problems concerning translation. There

is also a need to clearly define the concept of non-market economy treatment and what constitutes "reasonable profit deduction". There should also be more precise guidelines on "the lesser duty" rule. The *de minimis* rule should be increased and the special and differential treatment provisions should be made more effective. The expert from Peru was of the opinion that AD duties should be considered as "exceptional duties" and applied in accordance with technical and justified criteria. It is necessary to work towards achieving a more transparent and predictable AD mechanism.

Experience of Uruguay

58. Since the Uruguay Round of Multilateral Trade Negotiations, Uruguay has established domestic regulations in line with the agreements on trade policy. Anti-dumping regulations were set out under decree 142/996 in 1996 and safeguard provisions under decree 2/99 in 1999, and a proposal by the Ministry of Agriculture and Fisheries on subsidies and countervailing measures is under study by the Ministry of Economy and Finance. Since 1996, the National Manufacturing Office has launched two anti-dumping investigations, one into US imports of synthetic fibres, the other into sunflower oil from Argentina. In both cases, the injury and causal link were proven (no AD duties, however, were imposed in either case). The main problems identified by Uruguay concerning anti-dumping are that domestic producers affected are not always prepared to defend themselves from unfair trade practices caused by their lack of technical knowledge and their unwillingness to bear the costs (in the case of small and medium-sized firms due to the lack of financial resources). There is also the issue of being able to demonstrate injury. In addition, Uruguay's main exports are agricultural products, whose markets are distorted by the constant use of subsidies by developed countries. For this reason, the expert from Uruguay stressed the importance of reviewing the issue of dumping.

Experience of Viet Nam

59. Viet Nam's economy is in transition to a market economy and its negotiations on accession to WTO are in progress, but it has encountered difficulties in terms of trade disputes relating to AD/CVD actions which threaten the survival of some key domestic industries. The lack of legislation and of human and financial resources and experiences, together with non-WTO membership, have all aggravated its position in trade disputes. Questions arising in this regard relate to the kind of international instruments that are available for Viet Nam to tackle these problems and safeguard domestic industries, and the provisional measures that could be applied to redress the situation given all difficulties involved.

Experience of Zimbabwe

60. Zimbabwe has never been subject to AD actions by its trading partners. However, these issues remain relevant to Zimbabwe as it faces possible dumped imports from its neighbouring trading partners in the context of regional economic integration under the South Africa-EU Free Trade Agreement, the SADC Trade Protocol and the COMESA Free Trade Agreement. The

Tariff Commission of Zimbabwe is the authority in charge of AD investigations. Zimbabwe brought its national legislation into conformity on the occasion of the country's 1994 WTO Trade Policy Review. The concepts of minimum dumping margin and sunset clause have since been introduced into its legislation. However, Zimbabwe is still experiencing difficulties in complying with its international obligations in this area. Technical assistance has been requested from the WTO and SADC in this regard. Particular problems facing Zimbabwe include: lack of skills and expertise in responsible authorities (Tariff Commission, Attorney General's Office, Department of Customs); the reluctance of the private sector to pursue cases; lack of institutional capacity; and lack of expertise in defending its interests in possible AD litigation by major partners.

Experience of Angola

61. Formally a centrally planned economy upon its independence in 1975, Angola had no need for trade remedy measures. The situation has not essentially changed in the context of economic opening and trade liberalization, as the country's domestic industry remains quasi-inexistent, except for petroleum and diamonds. However, recently there emerged awareness as to possible cases of dumped or subsidized imports. Angola has had difficulty in this regard, particularly in measuring commercial transactions, due to the weak institutional capacity of its customs administration; and in undertaking AD/CVD investigations owing to lack of financial and human resources and expertise. Capacity building is key, and technical assistance is requested from UNCTAD.

Experience of Chile

62. Since 1996, Chilean exporters have faced 13 anti-dumping and subsidy actions affecting wine, salmon and trout. The case of Chilean salmon exports to the United States is illustrative in this regard. The US ITC determined that Chilean exports of salmon were being dumped. The margin of dumping was not arrived at by comparing the export price of salmon with the comparable price in the Chilean domestic market. This was because sales in the Chilean domestic market were estimated to be less than 5 per cent of salmon exports to the United States and therefore were not considered to be of sufficient quantity to determine the normal value. The expert from Chile expressed the view that this 5 per cent criterion should be eliminated and replaced by a criterion that compares per capita consumption of exports and domestic sales. Alternatively, it could be replaced by any other criterion weighted according to the size of the economy.

Experience of the United Republic of Tanzania

63. In the context of the significant increase in the country's trade as a result of the trade liberalization effort, sectors such as sugar and textiles have been severely affected by dumped imports. While material injury is perceived to exist as a result of such dumped imports, Tanzania has difficulty in pursuing investigations and determining dumping and injury. As an LDC, it lacks capacity in terms of resources and expertise in initiating AD actions. The AAD should be

made more flexible for the LDCs, and the special and differential treatment provisions should be more LDC-friendly. Technical assistance, in particular in defending LDCs' interests in possible AD cases brought by their trading partners, should be provided by international agencies.

Experience of Kenya

64. Kenya has a legal basis for AD and CVD measures (sections 125 and 126 of the Customs and Excise Act), but has never applied them owing to the complexity of the rules, the high financial cost involved, and the technical difficulties in pursuing investigations effectively (i.e. collection of factual information in determining the normal export price). Both the Government and the private sector suffer from limited capacity. The expert from Kenya considered that the process of investigation should be simplified: the determination of injury is too complex and costly. In addition, WTO rules could be strengthened in terms of the operationalization of Article 15 of ADA, as well as the dispute settlement body standard of review. The cost of defending its interests against foreign AD investigations is another issue of importance for Kenya. In this regard, financial and technical assistance is needed from donors and international agencies, most notably from UNCTAD.

Experience of Mauritius

65. Mauritius has no national experience in conducting AD actions and lacks the capacity to pursue investigations, while domestic industries are increasingly excluded from markets by cheaper imports. Mauritius has a concern about dumping practices of neighbouring countries members of SADC and COMESA. The expert from Mauritius was of the view that national experiences presented at the meeting should be adapted to the local context, while practical solutions should be tailored to each developing country. In this context, small economies, like Mauritius, face particular and unique problems. The same tailored approach should be adopted with regard to delivering technical assistance for developing countries.

Experience of the Republic of Korea

66. During the 1990s, the Republic of Korea was among the top three countries affected by AD/CVD measures, and the most targeted products were steel, chemical products, electronic/electric products and textiles. Confronted with the difficulties of what it regarded as persistently arbitrary and inconsistent application and interpretation of AD rules, the country found it impossible to resort to the WTO dispute settlement body for the interpretation and clarification of individual issues. The WTO dispute settlement procedures also entail a tremendous administrative and financial burden for the Government. On the other hand, the Republic of Korea has also initiated more than 50 AD cases against imports from other countries since 1987. In order to improve the AD/CVD system, the following issues were suggested for consideration in the future: the 5 per cent test rule, sales below cost of production (including both cyclical industry and financial expense), minimum volume of profitable sales, the need to clarify

imprecise expressions (such as "ordinary course of trade", "appropriate third country", "start up period", "level of trade", etc.). reasonable profit margin in constructed normal values, price comparison, credit expense, duty drawback, *de minimis* margins, standing, negligible imports, lesser duty rule, sunset review, and special and differential treatment. In particular, there is a need to ensure that the same data set should lead to the same conclusion as to the existence or not of dumping, as well as dumping margins.

B. Presentations by resource persons

Mr. William H. Barringer (Willkie Farr and Gallagher, Washington D.C.)

67. Several categories of adverse impact that anti-dumping and countervailing measures have can be identified: (a) AD and CVD measures prevent manufacturers from pursuing the same commercial strategies in export markets as they are permitted to pursue in domestic markets (such as selling at lower prices to large-volume purchasers, selling below cost in down cycles or product cycle pricing); (b) the cost of defending AD/CVD cases is very high (in the United States, an average AD case costs between $500 000 and $1,000,000 to defend). Under such circumstances, small players do not have the resources to defend their interests adequately; (c) most AD cases exclude a product from a market for a number of reasons such as the uncertainty of liability or the fact that margins are not related to injury (lesser duty rule); (d) AD measures tend to distort investment decisions and encourage investment in larger markets; (e) with cumulation rules, AD actions have a disproportionate impact on small suppliers. The negative impact of AD measures is so extreme that most targeted companies would probably prefer WTO-illegal measures such as minimum prices and quotas to be used instead of AD measures as at least they had the virtues of certainty and did not allow exclusion from markets. Fine-tuning of the rules (e.g. how dumping and injury are determined) would not eliminate the major trade-distorting effects of AD measures. A more fundamental reform is needed. However, several specific problems may be solved in the areas of asymmetric price comparison, sales below cost/ordinary course of trade, compensation standard, price undertakings and the sunset provisions. The adverse effects of CVD measures are less significant but still important, for example in terms of impacts on development strategies and programmes. Regarding specific AD actions against steel products, it is questionable, if such measures are capable of addressing the global problem of steel overcapacities. Steel is considered a politically important sector, particularly in the United States. In this context, there has been a major shift in the United States from voluntary export restraints to AD actions in this sector.

Mr. Edwin Vermulst (Vermulst, Waer & Vehaeghe, Brussels)

68. For the existing AD rules, the stringent application of the rules would be most important. As developing countries are no longer just victims of AD/CVD measures, their interests should be carefully considered. Developing countries should focus their limited resources on some of the issues of special importance based on their real impact, such as: (1) sales below cost; (2) constructed price; (3) constructed export price; (4) fair comparison of prices; (5) non-market

economy criteria; (6) AD/CVD duty drawback scheme. On the question of the standard of review (Article 17.6 of the ADA), which has been heavily criticised, the situation now turns out to be less disadvantageous than anticipated. The review standard actually applied in AD cases does not appear to be any different from the one exercised in other dispute settlement cases. Developing countries should not, therefore, spend negotiating currency on it. Nor should negotiating energy be wasted on the issue of reimbursement of AD duties. Such a reimbursement could cause substantial difficulties, and countries should keep in mind that they might find themselves on the other side of the table as well.

69. With regard to EU AD/CVD cases over the last five years on textiles, various problems arising in this context such as the *de minimis* threshold, back-to-back investigations, level of trade, credit costs and duty drawback were discussed. It was the view of the resource person that an increase in the *de minimis* dumping margin from 2 to 5 per cent - as sometimes suggested – would not have had a major impact. It is therefore not recommended to spend negotiating energy on such an increase. Rather, negotiators should focus on tightening substantive dumping margin calculation methods. An increase in *de minimis* imports (or a market share test) also seems promising. As far as subsidies are concerned, the concept of specificity needs to be defined, while the duty drawback provisions in Annexes II and III of the Agreement on Subsidies and Countervailing Measures need to be loosened for developing countries. The burden of proof with respect to standing should not shift to the respondent.

Mr. Munir Ahmad (International Textile and Clothing Bureau)

70. The total volume of textile imports in the EU subject to AD duties is significant, with the major target remaining Asian exporters, most notably India, Pakistan and Egypt, whose share has decreased significantly since 1995. It has been ascertained that, when an AD investigation has been initiated but has not resulted in the imposition of AD duties, a notion of nullification and impairment can be made applicable. While, under the ATC, no AD action can be taken within quota, given the elimination of all quotas in 2005, compliance with the sunset clause is of paramount importance. In particular, in the expected event of a sharp increase in imports in textiles and clothing after 2005, which would cause a sharp drop in prices, it can be foreseen that AD action will be taken much more frequently. Two options are possible in addressing the issue: firstly addressing technical issues in current AD rules; and secondly, agreeing on a moratorium in the course of which products previously subject to quotas would not be targeted by AD action.

Mr. Dean Spinanger (Kiel Institute of World Economics)

71. Given the increases in AD measures in recent years, a tragedy is now developing in which particularly the United States and the EU have written the script according to which developing countries now enact AD rules. While the EU and the United States are continuing to be the major users of AD, developing countries around the world are now using AD measures more and more. Overall, whereas actions by industrialized countries exceeded those by developing countries in the early 1990s by roughly 250 per cent, since then developing countries have taken over the

lead. As far as industrialized countries are concerned, most of their AD measures are still concentrated on developing countries, whose share has increased during the 1990s from 63 per cent to 75 per cent. The developing countries, on the other hand, have been initiating AD measures against other developing countries. Over the entire decade of the 1990s, developing countries targeted almost 70 per cent of their AD measures at other developing countries. Concerning the countries hit by AD measures, the EU was most affected in the 1990s, followed by China, the CIS countries and the United States. Whereas the number of AD measures initiated against the EU, China and the United States decreased over the period, it was the economies in transition which showed noticeable increases in AD measures. If the AD measures are looked at in terms of the amount of imports actually registered in the countries concerned in the time period in question, then it becomes quite obvious that the impact of these measures is far greater in the transition economies. However, other countries such as China and the Republic of Korea likewise exhibit a large impact coefficient. The conclusion can be drawn that the Uruguay Round tariff reductions caused countries to revert to AD or to other contingent protection measures. It is quite conceivable that the complacency of industries that were highly protected before the Uruguay Round has induced Governments to enact contingent protection. The loose wording of the ADA leads to the situation where it is simply an "easy way out" to revert to AD actions.

C. Summary of the comments made at the Expert Meeting

72. In the discussions on country experiences and presentations by resource persons, as well as under item 4, the comments set out below were made.

General comments

73. While noting the irrelevance of the North-South divide in the area of AD and the fact that developing countries have increasingly used AD rules, some experts were of the view that attention should be given to improving the general rules applicable to all countries, irrespective of level of development (such as Article 17.6 of the ADA regarding the legal approach to be adopted by the panel for the determination of dumping and the lesser duty rule). Others said that the major thrust of views presented highlighted the need for the more stringent application of general rules on AD.

74. Several experts pointed to the fact that the impact of AD is disproportionately severe for developing countries, where exporters are often SMEs. In emphasizing the problem of persistent and repeated use of AD actions ("back-to-back complaints"), some experts said that the issue is of interest to other target countries as well and thus a communality of interest exists. They also raised issues such as 5 per cent rules, sales below cost, lesser duty rules, adjustment, cumulation rules, special and differential treatment, and identification of injury. The issue of sales below cost may need a special provision specific to such products as agricultural products.

75. One expert said that AD actions have become a major factor in deciding the location of FDI in EU and US markets.

76. It was pointed out that difficulties arising from the complexity and technicality of anti-dumping regulations call for fairer and clearer rules. Developing countries have to accept the current rules in order to be admitted to the WTO. Problems faced by developing countries often relate to the administration of AD/CVD rules, rather than to the rules themselves.

Special and differential treatment

77. Given the fact that Article 15 of the ADA remains a best-endeavour clause, many experts called for the operationalization of this Article and the improvement of the special and differential treatment provisions (in particular increases in *de minimis* margins and criteria for determining negligibility of imports). It was suggested that a study could be undertaken by UNCTAD to measure the impact of various changes in *de minimis* thresholds.

LDCs and African countries

78. With regard to the LDCs' perspective in the area of AD/CVD and the various difficulties experienced by those countries, one expert suggested that technical assistance could be provided upon request to assist the countries concerned in instituting and administrating AD legislation.

Non-market economy criteria

79. On the issue of "non-market-economy" treatment, several experts said that very few countries at present meet the criteria set out in Article VI of GATT 1994, and clear guidelines need to be discussed or developed.

80. However, another expert pointed out that non-market-economy status has been made necessary in AD investigations as the latter rely heavily on the assumption that prices and costs are determined by market forces. She reminded the Meeting that, if such an assumption did not stand, no AD investigation would be possible and that, therefore, a clearer rule, rather than the elimination of the rule, would be needed.

81. This view was supported by another expert in view of the difficulty in applying non-market-economy status in some cases where there exists a proliferation of state monopolies and price controls. He suggested that the definition should be changed and clarified. One expert stressed that the non-market-economy criteria, taken together with the subjective methodology applied in calculating price, has often led to higher AD duties.

Specific comments

82. On sunset review, one expert highlighted the fact that 32 out of 77 AD cases brought are currently under review by his authorities, which in his view is a sign of effective compliance with

the ADA by the Government. He also pointed out that special and differential treatment has been applied in the form of a phase of practical investigation of AD action.

83. On lesser duty, one expert recalled that ADA Article 9 makes its application discretionary and not mandatory. However, several exports highlighted the need to make the application of lesser duty rules mandatory. One expert said that the EU also applies a "public interest text" in adopting lesser duty rules so as to measure the overall impact of a proposed AD duty on the economy as a whole.

84. Several experts suggested the need to explore ways and means of addressing the expected increase in AD applications against textile products after the expiration of the current quota system under the Agreement on Textiles and Clothing.

85. Noting national experiences presented, one expert acknowledged that the ADA is difficult to implement, especially for developing countries, pointed to the existence of profound problems entailed in AD action, and observed that a certain bias exists in national AD legislation in terms of determining dumping.

86. In highlighting the disproportionate impact of AD actions on SMEs of developing countries, one expert said that this is mainly due to the enterprises' small production and export capacity and limited diversification (e.g. cut flowers from Columbia, crude oil from Venezuela). Commodity-type products sold at world prices are often the target of AD action by major markets, and small and developing countries cannot afford the cost of such action.

87. One expert raised issues of "sales below cost" and 3 per cent import thresholds for negligible import volumes and urged that a specific rule be applied for technology products and that the 3 per cent criteria be increased to 5 per cent.

88. One expert said that the question of sales below cost should be considered in the broader context of symmetric and fair price comparisons and cautioned against too lax an application of sales below cost. The importance of uniform rules in cost calculation was underscored.

89. Concerning the adjustment issue, one expert emphasized that the burden of proof should be born not by the exporter but by the investigating authority.

90. Commenting on the 5 per cent test for sales in domestic markets, one expert stressed that low levels of domestic consumption should be taken into account.

91. One expert stated that the issue at stake on the question of cost is not the ADA but the way it is implemented. On cumulation, he said that market share, not import share, should be the bottom line for determining 3 per cent negligibility for small suppliers.

92. Several experts agreed on the need for uniform methodology in the calculation of cost and thus dumping margins. Consistent and coherent rules would thus be important. In this regard EU AD rules are positive in that they automatically and consistently lead to the application of the lesser duty rule, thereby producing predictability in the system.

III. ORGANIZATIONAL MATTERS

A. Convening of the Expert Meeting

93. In accordance with the decision of the Trade and Development Board at its twenty-fourth session, on 12 May 2000,[3] the Expert Meeting on Anti-Dumping and Countervailing Actions was held at the Palais des Nations, Geneva, from 4 to 6 December 2000. The meeting was opened on 4 December 2000 by Mr. Carlos Fortin, Deputy Secretary-General of UNCTAD.

B. Election of officers

(Agenda item 1)

94. At its opening meeting, the Expert Meeting elected the following officers to serve on its Bureau:

Chairperson: Ms. Margaret Liang (Singapore)

Vice-Chairperson-cum-Rapporteur: Mr. Roberto Corona Guzman (Mexico)

C. Adoption of the agenda

(Agenda item 2)

95. At the same meeting, the Expert Meeting adopted the provisional agenda circulated in document TD/B/COM.1/EM.14/1. Accordingly, the agenda of the Meeting was as follows:

1. Election of officers

2. Adoption of the agenda

3. The impact of anti-dumping and countervailing duty actions on the trade of member States, in particular developing countries

4. Main issues and areas of concern that need to be addressed in the light of concrete experiences presented by national experts

5. Adoption of the outcome of the Meeting

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[3] See Report of the Trade and Development Board on its twenty-fourth session (TD/B/EX(24)/3), paragraph 46 and annex III.

D. Documentation

96. For its consideration of the substantive agenda items (items 3 and 4), the Expert Meeting had before it a background note by the UNCTAD secretariat entitled "Impact of anti-dumping and countervailing duty actions" (TD/B/COM.1/EM.14/2).

E. Adoption of the report

(Agenda item 5)

97. At its closing meeting, on 6 December 2000, the Expert Meeting authorized the Rapporteur to prepare the final report of the Meeting, under the authority of the Chairperson, to include the outcome adopted by the Meeting (see chapter I) and the summary of the discussions (see chapter II).

Annex

ATTENDANCE *

1. Experts from the following States members of UNCTAD attended the Meeting:

Aleria
Angola
Argentina
Austria
Benin
Bolivia
Brazil
Burundi
Cameroon
Chile
China
Comoros
Costa Rica
Cuba
Czech Republic
Democratic People's Republic of Korea
Dominican Republic
Egypt
El Salvador
France
Hungary
India
Indonesia
Israel
Italy
Japan
Kazakhstan
Lithuania
Madagascar
Malaysia
Mauritius
Mexico
Mongolia
Morocco
Nepal
Nicaragua
Nigeria
Pakistan
Panama
Paraguay
Peru
Philippines
Republic of Korea
Russian Federation
Saudi Arabia
Slovenia
Spain
Sri Lanka
Thailand
Togo
Tonga
Tunisia
Turkey
United Kingdom of Great Britain and Northern Ireland
United Republic of Tanzania
United States of America
Uruguay
Venezuela
Viet Nam
Yemen
Zimbabwe

* For the list of participants, see TD/B/COM.1/EM.14/INF.1.

2. The following intergovernmental organizations were represented at the Meeting:

Arab Labour Organization
Commonwealth Secretariat
European Community
International Textiles and Clothing Bureau
League of Arab States
Organization of the Islamic Conference
South Centre

3. The following international organization was represented at the Meeting:

World Trade Organization

4. The following non-governmental organizations were represented at the Meeting:

Special Category

International Chamber of Commerce
European Chemical Industry Council
World Federation of United Nations Association

5. The following specially invited persons attended the Meeting:

Mr. William H. Barringer, Willkie Farr and Gallagher
Mr. Peter Clark, Grey Clark, Shih & Associates, Ltd.
Mr. Gary N. Horlick, O'Melveny & Myers LLP
Mr. David Palmeter, Powell, Goldstein, Frazer & Murphy LLP
Mr. Dean Spinanger, Kiel Institute of World Economics
Mr. Edwin Vermulst, Vermulst, Wear & Verhaeghe

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